No. 3102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL CARBON COMPANY,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY,
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

This is an appeal from a decree of the United States District Court for the Western District of Washington, Southern Division. The case was tried before Judge Cushman. The District Court dismissed the libel.

Pleadings.

The libel sets forth the following facts:

On September 8th, 1915, the libellant shipped and placed on board the steamship "Eureka", then lying at the port of New York, 116 barrels containing dry battery cells consigned to the libellant at San Francisco and to be carried by the "Eureka" from New York to

San Francisco. On September 14th, 1915, the libellant shipped from Philadelphia an additional quantity of dry battery cells, namely, 12 boxes and 123 barrels on September 17th and 124 barrels and one box on September 16th. The goods shipped on the 14th of September were to be carried to San Francisco and there delivered to the libellants and the goods shipped on September 16th were to be carried to Los Angeles and there delivered to F. H. Murray. The "Eureka" sailed from Philadelphia, but did not arrive at San Francisco. On October 1st, the libellant heard that the Panama Canal was closed to navigation. Libellant immediately inquired of the agents of the "Eureka" at Philadelphia as to where the vessel was at that time. The agents of the "Eurkea" informed the libellant that the vessel was detained by the cause of the closing of the canal and that she was then at the port of Colon. Libellant immediately notified the agents of the "Eureka" that its goods shipped on board the "Eureka" were perishable and it offered to pay for the discharge of said goods and to pay for all costs that might be incurred by way of discharging and restowing the cargo which necessarily would be disturbed in reaching libellant's goods. The agents of the "Eureka" failed and refused to deliver the goods to the libellant. The libellant repeatedly renewed this request and demanded that the cargo be delivered at once to it. It again notified the agents of the vessel that unless a delivery was immediately made, its goods would be a total loss because of their perishable nature. Several weeks elapsed after the offers, requests and demands above mentioned were

made. In the meantime libellant was in constant communication with those in charge of the "Eureka" renewing its offers and requests but those representing the vessel still refused to make delivery of the goods. Nothing was done by those in charge of the vessel until November 22nd and 23rd when the cargo was delivered to the libellant at New Orleans, La.

As the libellant had predicted, the cargo in the meantime became very badly damaged. A suit was brought to recover the damage so sustained by the cargo.

Exceptions were filed to this libel by the Alaska Steamship Company, who appeared as claimant of the steamship "Eureka". These exceptions were subsequently amended. The exceptions were overruled by order of Judge Nederer and an answer was then filed by the Alaska Steamship Company to the libel.

In the answer it is admitted that the allegations of the libel with respect to the goods being shipped on board the "Eureka" are true, but the claimant denies any knowledge or information sufficient to form a belief as to the allegations with respect to the condition of the goods when shipped. The claimant sets up a number of facts with respect to the ownership of the "Eureka" and to the charters under which the vessel was operating, but as no proof has been adduced by the claimant to substantiate any of these allegations, it is submitted that no further attention need be paid to them. Claimant admits that the "Eureka" did not arrive at San Francisco and sets up a number of facts as a special defense.

The claimant has set up a number of clauses in the bills of lading which it contends in its answer exonerates the vessel from the performance of its voyage. The first of these clauses was the usual bill of lading clause which provides in general terms that the carrier shall have the liberty of lighterage and which further provides that if the vessel puts into a port of refuge or be prevented from proceeding on the voyage, the carrier shall have the liberty of transshipment and also releases the carrier from loss or damage occasioned by the usually specified causes, such as perils of the sea, etc. The second clause of the bill of lading relied upon as a defense provides that the carrier should not be liable for delay except as warehouseman and gives the carrier the right of transshipment.

The third clause of the bill of lading relied upon as a defense provides:

> "When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measure, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled to load, discharge, transship, put into warehouse or quarantine depot, or into a lighter, bulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, including Surtaze d' Entre P'ot, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods."

The answer then alleges that, when it became apparent that the canal would probably remain closed for

some time, the owners and charterers *and their agents* endeavored to find some method of transshipping the cargo, but they were unable to arrange for transshipment. While the steamer was so detained, libellant demanded that the Oregon-California Shipping Company transship the cargo immediately and that the libellant would hold the Oregon-California Shipping Company and the owner of the steamship "Eureka" liable for any damage in the event that the steamer should be sent by the Straits of Magellan. The answer sets up that the charterers of the steamer notified the libellant on October 24th, 1915, that the vessel would be diverted to New Orleans.

As a fourth defense claimant further sets up the usual bill of lading clause which provides that the carrier should not be liable for gold, silver, precious stones, etc., and for loss or damage arising from any of the following causes, viz: fire from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or thieves, etc., and further that the damage to the libellant's goods was caused by the inherent defects in the goods. As a fifth defense, the claimant sets up a clause in the bill of lading which provided that claim for damage to the goods must be made before the removal of the goods.

ALL OF THE WITNESSES EXAMINED ON BEHALF OF THE LIBELLANT WERE EXAMINED BY DEPOSITION.

This court is therefore, equally as well able as the lower court to judge the facts of the case. See *Lehigh*

Valley Transportation Company v. Knickerbocker etc. Co., 212 Fed. 708, 709, where the Circuit Court of Appeals for the Second Circuit said:

> "When it comes to the question of fact, we are as well able to decide it as was the District Judge, because all the important testimony was taken by deposition."

Judge Hunt, of this Circuit, speaking for this Court in the case of *The Santa Rita,* said:

> "In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libelant's principal witnesses, who gave direct evidence thereon, testified by depositions. Upon this matter, therefore, the trial judge had not the advantage of seeing and hearing the witnesses. His position, to arrive at a true result, was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of a finding, or the written testimony relates to matters as to which the trial court is better able to reach a satisfactory conclusion than the appellate court, the finding will be adhered to, does not apply with the same force."
>
> *The Santa Rita,* 176 Fed. 890 at 893.

Facts.

Anson J. Mitchell was the traffic manager for the libellant. He entered into the contracts of carriage above mentioned with Phelps Bros. & Co. of New York and L. Rubelli's Sons of Philadelphia for the carriage of the dry battery cells from New York and Philadelphia to San Francisco and Los Angeles. When the goods were sent to New York and Philadelphia for ship-

ment, Mr. Mitchell wrote a letter to the agents of the vessel both at New York and Philadelphia:

> "I wrote them a letter enclosing the original bill of lading, giving the number of the barrels and boxes, car number, stating to whom they were consigned and the value, advising them that we had prepaid all charges to destination and asked them to send us the ocean bill of lading."
>
> (Mitchell page 13.)

See these letters, Libellant's Exhibits 7, 8 and 9.

The bills of lading referred to by Mr. Mitchell were the inland bills for the carriage of the goods from Cleveland, Ohio, where they were manufactured, to New York and Philadelphia. The National Carbon Company delivered the goods to the rail carrier at Cleveland for carriage to New York and Philadelphia where they were to be delivered to the steamship company. These goods were in good order when they left Cleveland, Ohio (Mitchell p. 15).

At one stage of the proceeding, the claimant made some point of the fact that a part of the goods were consigned to F. H. Murray at Los Angeles. It appears from Mitchell's testimony (Mitchell page 15) that Murray was the agent of the libellant and that the goods really belonged to the libellant and were only consigned to Mr. Murray in his own name for his convenience. The bill of lading issued for the goods shipped from New York to San Francisco was signed "J. U. English for Oregon-California Shipping Company" (Libellant's Exhibit 2). English was connected with Phelps Brothers & Company, the New York agents of L. Rubelli's

Sons of Philadelphia (Kurz pp. 134, 135). The freight was prepaid on this shipment. The goods which were placed on board the "Eureka" at Philadelphia were shipped under bills of lading signed "R. B. Bates for Oregon-California Shipping Company" (Libellant's Exhibits 3 and 5). Bates was an employee of L. Rubelli's Sons (Kurz p. 135).

On October 1st, 1915, Mr. Mitchell telegraphed Rubelli's Sons, asking them to inform him where the steamship "Eureka" was at that time (Mitchell pages 16 and 17) (Libellant's Exhibit 10). On October 2nd, Mr. Mitchell received a telegram from Rubelli's Sons as follows:

(Libellant's Exhibit 11.)

"Branch Telegraph Office
Cor. Madison Ave. & 117th St. N. W.
Cleveland, Ohio.

WN	Line	22P	Message
Number	Sent by	Received by	Check
16	Hr	GC.	14
Dated	Philadelphia, Pa.	Received 10/2	1915

Tampico due East San Pedro yesterday 'Eureka' last report arrived this side Cristobal twenty ninth Sept.

Rubellis Sons."

On October 8th, Mr. Mitchell hearing nothing further from either Rubelli's Sons or Phelps Brothers & Company came to New York and interviewed Phelps Brothers & Company. He then went to Philadelphia and interviewed Rubelli's Sons & Company on October 9th, 1915. At this interview Mitchell pointed out to Kurz, Davis and Bates that the goods were of a perishable nature and that he thought it would be advisable to

take the goods out of the ship. Kurz then sent for the foreman stevedore employed by Rubelli's Sons Company and the stevedore brought with him the stowage plan of the "Eureka" which showed how the goods had been stowed in the vessel. Mr. Mitchell then inquired as to what would be the approximate expense of discharging his goods from the "Eureka" at Colon. He says:

> "I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time, I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time."
>
> (Mitchell pages 19 and 20.)

Mitchell further explained why the batteries would deteriorate if kept in the ship and that it was absolutely necessary for the goods to be delivered at once. Rubelli's Sons & Company refused to deliver the goods to Mitchell. Mitchell's testimony on this point is as follows:

> "Q. Did they refuse to deliver them?
> A. They did."
>
> (Mitchell page 23.)

Mitchell testifies that he could have brought the goods back to New York and that by so doing if the goods had been delivered to him promptly at Colon that the damage to the goods would have been avoided. It appears also from his testimony that there were a number of lines of steamers operating between Colon and New York and that there would have been no difficulty in getting freight room on these ships as the only ships which were affected by the slides at Panama were the ships which were bound through the canal.

Mitchell repeated his demands, on or about October 22nd, 1915, when he again went to Philadelphia. At this time he was shown a copy of a telegram which Rubelli's Sons & Company had sent to the Oregon-California Shipping Company (Libellant's Exhibit 12) (Mitchell pages 26 and 27).

(Libellant's Exhibit 12.)

"Western Union Telegram

Charge Phila Shipping Co.
Oct. 18, 1915.

Oregon California Shipping Co.
Railway Exchange Building
Portland, Ore.

National Carbon Company insist that shipments 'Eureka' should not go via Magellan account batteries would be worthless on arrival destination Stop *They offered pay all expenses discharging including loading back on board any other goods in order to forward their goods from Colon* Stop We made them proposition our wire fourteenth which they state very satisfactory Stop To avoid heavy claims better transship cargo Wire quick.

L. Rubelli's Sons."

In the meantime, on October 14th, Mitchell had telephoned from Cleveland to Rubelli's Sons & Company at Philadelphia and renewed his demands. On October 16th he again telephoned Rubelli's Sons from Cleveland and he was informed by Davis that Rubelli's anticipated making arrangements to unload the goods at Panama. The arrangements referred to are set forth in a circular which was issued afterwards under date of October 22nd. This circular is in evidence as libellant's exhibit 14. In this circular it is said:

> "We were, as agents for the Oregon-California Shipping Company, in daily touch with the Captain of the steamer and from his first report it was hoped that the steamer could pass through the canal about October 10th."

It was on or about October 18th that Mitchell first heard that it was contemplated that the vessel might be sent by way of the Straits of Magellan (Mitchell page 39). He immediately protested:

> "Because we made a demand for the goods at Colon knowing that we could get rid of them quicker and easier after taking delivery at Colon, and also the further fact that the long voyage around by way of Magellan would naturally tend to make the batteries what we call seconds instead of first-class cells."
>
> (Mitchell page 40.)

Mitchell's testimony as to what occurred at the interview at Philadelphia on October 22nd is as follows:

> "Q. Did they agree to give you any delivery at Colon?
>
> A. They would not.

Q. Did they refuse?
A. They stated they could not.
Q. Did they state why they could not?
A. They stated they had put the matter up to their people at Portland and they could not get them to agree. They thought my proposition was more than fair."

(Mitchell page 43.)

Kurz confirms Mitchell's account of what took place at the interview (Kurz p. 145). About November 1st, Kurz of Rubelli's Sons & Company apparently despairing of getting the Oregon-California Shipping Company to do anything towards the relief of the situation, decided to go to Portland, Oregon. He says:

"My trip was for the purpose of getting some definite action, as the shippers were after us for information as to what was going to be done, and I didn't care whether I was helping the Oregon-California Shipping Co. or anyone else, all I was interested in was getting that cargo to its destination."

(Kurz page 149.)

After Kurz arrived at Portland, Oregon, and, after he had conferred with the Oregon-California Shipping Company, he sent a number of cables to the master of the "Eureka" (see Libellant's Exhibits 71, 72, 73 and 74). One of these cables is quoted by the District Judge in his opinion. The vessel did proceed to New Orleans in response to these orders. When Mr. Mitchell learned that the vessel was going to New Orleans, he immediately went there and was there when the vessel arrived. This was on or about November 22nd, 23rd, 1915 (Mitchell page 49). He met Kurz and Williams, the general manager of the Oregon-California Shipping

Company at New Orleans. When the cargo was taken out of the ship, Mitchell found that a number of the barrels were broken open. He made tests of the cells and he found that they had been very badly damaged as a result of their being in the ship for such a long period of time (Mitchell pages 49 and 50). He says:

> "The batteries showed that they had been subjected as far as I could distinguish, to extreme heat, I presume that we could offer more of a scientific reason why, by our chemist, whom I can bring over here, but to my mind, and I have inspected hundreds of shipments, the batteries were not what we would term first class. A great number of them that I tested I found the amperage running lower than what they should, and also the seal on the cell showed the imprints of the straw, which tended to show, of course, that the heat had been excessive, and naturally began to melt the wax."
>
> (Mitchell page 50.)

Mitchell at once notified Mr. Williams, the general manager of the Oregon-California Shipping Company, in person that the libellant would claim damages for the injury to its goods (Mitchell page 56). Mitchell also served Williams with a letter thus making claim in writing.

The goods were then shipped to the New Jersey plant of the libellant where they were examined by chemists. These chemists testified that the cells had been badly damaged by heat. See the testimony of Edwin J. Wilson and William A. Richey.

Captain Francis G. Coxon, an expert witness examined by the libellant, testified that the heat in a ship's

hold while she is lying at rest would be in excess of the heat prevailing at the time the ship was under way.

On these facts the District Judge held that the "Eureka" was not responsible for the libellant's damages, because the demand which Mitchell had made for the delivery of the goods had been made upon Kurz and not upon the Oregon-California Shipping Company. It is submitted that the court erred in so holding.

Point I.

LIBELLANT'S RIGHT OF RECOVERY WAS BASED UPON THE REFUSAL OF THE AGENTS OF THE STEAMSHIP "EUREKA" AT PHILADELPHIA TO RESPOND TO THE DEMAND MADE THEM BY MITCHELL AT PHILADELPHIA.

As long ago as the case of *The Martha,* 35 Fed. Rep. 313, it was held that such a state of facts as we have proved in this case makes out a case for the libellant. In *The Martha* case the facts were as follows:

On September 17th, 1884, the S. S. "Martha" left Havre, France, bound for New York, with a general cargo on board. A part of the cargo consisted of one hundred and twenty-five (125) barrels of crude glycerine, consigned to a firm in New York. When the ship was a few days out from Havre her machinery broke down and she was compelled to make the port of Halifax. Before reaching Halifax another accident occurred which rendered her machinery useless and she was finally towed into Halifax, arriving there the first

of October. On examination is was found that to repair her machinery certain parts of the engine would have to be ordered from Europe. This detained the steamer in Halifax until the 14th of February, 1885, when she sailed for New York, arriving at New York on the 17th of February, 1885.

As soon as the probability of long detention of the steamer became known to the consignee of the glycerine, he applied to the owners of the steamer through her *agent in New York*, for delivery to him of the glycerine in Halifax and offered to pay the full freight under the bill of lading, together with all his incidental expenses. The shipowner refused to make delivery and the libellant thereupon notified *the ship's agent* in New York that he would hold the ship for any damages that might be sustained by the detention of the glycerine. After the ship arrived in New York it was found that a number of the barrels of glycerine were entirely empty and that the glycerine had leaked out and that the barrels had deteriorated because of the delay in delivery.

The court said:

> "The demand for a delivery of the glycerine in Halifax, accompanied with a tender of payment of full freight together with all incidental expenses, and an average bond is testified to by the consignee who made the tender and by the agent of the ship through whom it was made. Against this testimony there is nothing and I see no reason upon which to reject the evidence. The fact being found that the vessel, in October put into Halifax, a port of distress, in need of repairs, that were not to be completed until the following February, that the consignee of the merchandise offered to take it

> in Halifax and pay all the freight provided for in the bill of lading, together with all the expenses incident thereto and to sign an average bond; and that the shipowner without reasonable excuse, refused to make such delivery but on the contract held the goods in the ship until her arrival at the port of New York,—the liability of the ship for all damages caused to the libellant by reason of the detention seems clear." (35 Fed. at 314.)

In the present case all of the freight had been *prepaid,* hence there was no need to offer to pay the freight. The vessel was not at a port of refuge, hence there was no general average. Mr. Mitchell offered to pay all the expense of discharging his goods, including the expense of unloading and reloading other cargo which had to be disturbed to get at his goods.

Mr. Kurz, the "Eureka's" agent at Philadelphia, supports Mr. Mitchell in his testimony on every point, just as the ship's agent in *The Martha* case supported the consignee in that case.

Furthermore, Mr. Mitchell's testimony is supported by documentary evidence and it has not been rebutted by testimony offered by the claimant, although the claimant had abundant opportunity to obtain testimony, as the case has now been pending for almost a year.

Point II.

THE EXCEPTIONS CONTAINED IN THE BILL OF LADING DO NOT AID THE CLAIMANT.

When the claimant filed its answer it set up as a defense certain clauses in the bill of lading exempting

the ship-owner for *delay*. It is to be borne in mind, however, that the libellant is not suing for damages for delay, but is claiming damages for refusal of the steamship owner to deliver his goods to him at Colon when demanded. It is clear, therefore, that the bill of lading clauses had nothing to do with this phase of the case.

The claimant also sets up the exception contained in the bill of lading which relieves the carrier from responsibility for the *deterioration* of the goods. It is believed that the claimant cannot be serious in this contention. Of course if the claimant had no notice of the character of libellant's goods and they should suffer because of their perishable nature, claimant would not be liable, exception or no exception, as the law reads such an exception into all contracts of affreightment. But where claimant is informed of the perishable nature of the goods, this imposes upon it, as a carrier, the duty to take such care of the goods as their perishable nature requires. And no exception which relieves the carrier of this responsibility is valid.

In the case of *Swift v. Furness Withy*, 87 Fed. Rep. 345, the syllabus is as follows:

> "When perishable goods are shipped, and the carrier is to receive adequate pay, no construction of the contract is admissible which will permit the carrier, arbitrarily, and without reason or necessity, to deprive the shipper of the benefit resulting from such shipment."

In that case the ship deviated from her voyage and the court held the carrier liable. With respect to certain exemptions contained in the bill of lading the court quoted the following language of *Liverpool, etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397:

> "The law does not allow a public carrier to abandon altogether his obligations to the public and to stipulate exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

In rendering the judgment in the case the court said:

> "I find as facts that, but for the return to Havre the beef would have been delivered on October 23rd and that the libellants used due diligence to reduce the damages and to care for the beef during the detention. The libellants are entitled to decree for the deterioration and for any fall in the market price after October 23rd and a reference may be taken to determine the amount of the damage."
>
> *Swift v. Furness Withy*, 87 Fed. at 348-349.

This case was referred to with approval, by Judge Hough, in the case of *The Citta di Mesina*, 169 Fed. Rep. 472.

In the present case the claimant has introduced no evidence whatever to show that the ship was seaworthy or that it exercised due diligence in making the ship seaworthy. Hence, even though the Harter Act applies—and we do not see how it could apply—the shipowner cannot claim the benefit of the Harter Act.

In the case of *The Wildcroft,* 201 U. S. 378, 398, the Supreme Court of the United States said:

> "In order to have the benefit of the exemptions provided in the Harter Act, 27 Stat. 445, against errors of management or navigation by reason of the third section, which was relied upon in the case, it was incumbent upon the ship-owner to prove that the vessel was seaworthy at the time of beginning the voyage, or that due diligence has been used to make her so. *International Navigation Company v. Farr & Bailey Manufacturing Company,* 181 U. S. 218; *The Southwark,* 191 U. S. 1".

When the ship-owner through its agents was informed of the perishable nature of libellant's goods, it became its duty either to deliver the goods to the libellant when demanded or to take such care of the goods as their nature demanded. It did neither. None of the exceptions in the bill of lading in any way justify the carrier for his failure to deliver the goods when a proper demand has been made as was done in this case. It would be carrying the doctrine of the inseverability of cargo and ship during a voyage to ridiculous lengths to say that an owner of goods could not have possession of them when he offers to pay every conceivable expense in connection with taking them out of the ship.

Point III.

L. RUBELLI'S SONS WERE IN FACT THE EASTERN AGENTS FOR THE OREGON-CALIFORNIA SHIPPING COMPANY.

In the statement of facts, we have pointed out that the bills of lading were signed by employees and agents

of L. Rubelli's Sons & Company. In addition to this documentary evidence showing that the contract of carriage was made by Rubelli's on behalf of the ship, we have the following additional documentary proof: the letter of L. Rubelli's Sons, dated October 22nd, in which Rubelli's says:

> "We were, as agents for the Oregon-California Shipping Co., Inc., of Portland, Oregon, in daily touch with the captain of the steamer (S. S. 'Eureka')."
>
> (Libellant's Exhibit 14.)

In a letter of October 8th, 1915, addressed to President Wilson, Rubelli's says:

> "We have just recently inaugurated our service between Philadelphia and the West Coast of the United States, and our S. S. 'Eureka,' the second steamer of this line, is now held up on the Eastern end of the Canal awaiting passage."
>
> (Libellant's Exhibit 48.)

The following telegrams were exchanged between Rubelli's Sons & Company and the Oregon-California Shipping Company:

> "Postal-Telegraph Commercial Cables Telegram
> 105 Dock Street, Phila.
> Phone, Lombard 4087.
>
> 41p jk. 'JEJ' 114 oAM
> Portland Oregon-Oct-4-15.
> L. Rubellis Sons,
> Phila Pa.
> We think imperative to either return 'Eureka' to Phila and unload to put in trade New York or Phila to Florida coast or Cuban sugar trade can't you get firm offers time charter basis or offer firm

freights stop what about going from Canal to Havana unload then take on sugar to Atlantic ports or pulp from Florida wire fully as we must decide quickly on something.

Oregon Calif. Shipping Co."

"Night Lettergram

Received at
1420 So. Penn. Square,
Phila. Pa. DeliveryNo. 570.

W 35 ON Y5 4 NL 1254 A
Portland Ore Oct. 5-15
L. Rubellis Sons
Pier 16 S Dela Ave Phila

Do not make arrangements to transfer 'Eureka' cargo as owners will not permit us to place ship on Atlantic trade stop our best legal talents pronounce slides act of God and state we are exempt from payment during detention what is your opinion see section three Act of Congress Feby thirteenth eighteen ninety three.

Oregon Calif Shipping Co."

"Night Letter
The Western Union Telegraph Company
charge
Philadelphia Oct. 9, 1915.

Oregon California Shipping Co.
Railway Exchange Bldg.,
Portland, Ore.

Cant you arrange transship 'Tampico' Portland cargo from Frisco then load up 'Tampico' with a cargo for Philadelphia or New York running down to Salino Cruz transferring over Tehauntepec Railroad to Puerto Mexico loading on 'Eureka' stop 'Eureka' could discharge her cargo Puerto Mexico send over to Salino Cruz and load on Tampico stop this suggestion made as latest report Canal may be closed till end year stop think could keep both

steamers busy that way till canal again opened stop you should be careful in making arrangements with Crosett or owners protect your interests being guided by our last wires stop think imperative make some arrangement to minimize loss to all concerned shippers also very anxious telegraph fully stop might be able arrange use Panama Railroad.

L. Rubelli's Sons,
CK."

"Postal Telegraph-Cable Company
Night Lettergram

1420 So. Penn Sqr., Phila. Pa.
A-42-NY Y 83-N. L., 332-A:M.

Portland, Oregon Oct. 11-15.

L. Rubelli's Sons
Pier 16 South Delaware Ave., Phila; Pa.

Yours date We are advised Crossett Western Lumber Co. something must be done with 'Eureka' account canal blocked.

Try your best secure offer time charter government form 'Eureka' say thirty days with option longer if canal continues closed using West Indies Florida Coast and Atlantic including Cuba stop. If you get direct offer overseas trade submit same stop What can you do on coal sugar and beet pulp stop our idea to unload at Colon and hold wire your opinion quickly.

Oregon-Calif' Shipping Co."

"Postal Telegraph-Cable Company
Night Lettergram

7 PJK 52 NL 736 AM
Portland Ogn Oct. 22-15.
L. Rubellis Sons
Phila Pa.

Idea Crossett Western run Eureka to New Orleans transfer to rail account absolutely unable to get ships on Pacific to handle and fearing suit account

delay stop can Kurz attend transfer prorating cost of ship to date on expense bills stop this seems only way to get goods to destination promptly answer.

Oregon California Shipping Co."

And in a letter dated October 16th, 1915, addressed to Rubelli's Sons & Company by the Oregon-California Shipping Company, Inc., it is said:

"So we will only ask you to help us bring about a solution of the matter. Should we discharge this cargo at Colon under the present conditions, it would possibly serve to relax the energies of the Crossett Western Lumber Co. and we do not care to take it upon ourselves to be responsible without any chance of gain when the Crossett Western Lumber Company is holding the bag."

It appears as has been stated by us in the statement of facts in the earlier part of this brief that all of the cablegrams which were sent to the master of the "Eureka" at Colon were signed by Kurz of L. Rubelli's Sons & Company at Philadelphia. One of these cables is quoted by the District Judge in his opinion (opinion page 73). The District Judge in his opinion says:

"The following telegram was thereafter sent the captain from Portland, on November 4th:

'Baggott, Colon:

Sail tomorrow morning to New Orleans. We will be there on arrival when are you due at destination. Keep destination strictly confidential. Telegraph us your sailing.

California Shipping Co.,

Kurz.

Charge Oregon-California Shipping Co.'

The Captain thereupon proceeded with the 'Eureka' to New Orleans, where the ship was met by

Mr. Kurz, manager of L. Rubelli's Sons, and Mr. Williams, general manager of the Oregon-California Shipping Co.

This telegram I interpret as from both the Oregon-California Shipping Co. and Mr. Kurz, as the representative of L. Rubelli's Sons. It will be noted in the signature that Kurz does not sign after the name of the company, Oregon-California Shipping Co., as would ordinarily be done if he was telegraphing on its behalf or as its agent. The telegram says 'we will be there' (New Orleans); that is, Kurz, as the representative of L. Rubelli's Sons and a representative of the Oregon-California Shipping Co. (Mr. Williams)."

The District Judge curiously has misread the exhibit 74, which he quotes in his opinion. The exhibit as introduced in evidence is as follows:

"Western Union Cablegram

Time filed
10:20 P. M.

Portland, Ore, November 4, 1915.

Bagott
Colon
Sbottassi Umypaentza Uvkpoiflun Umbegidkip
Herippidas Keepivseg Faultag Schlankweg
Kurz

Sail tomorrow morning at New Orleans. We will be there on arrival when are you due at destination keep destination strictly confidential telegraph us your sailing.

Charge Oregon California Shipping Co."

It is to be noted that the cable in code as sent to the master of the "Eureka" was signed by Kurz only. The decoded message kept as a copy for reference instructs the Telegraph Company to charge the expense

of sending cable to the Oregon California Shipping Company. Kurz admits that his name was signed to the cablegrams instead of the name of the Oregon California Shipping Company, Inc. He says:

> "My name was only signed to those cables because I started to cable the captain. He knew my name; I don't know whether he would know Mr. Williams' name."
>
> (Kurz, page 151.)

After receiving the cable referred to, the master of the "Eureka" proceeded with his vessel to New Orleans, pursuant to orders received from Kurz. If Kurz had been an agent only for the purpose of soliciting freight, would he have done so?

It is apparent from reading the various cables which passed between the parties, that the master of the "Eureka" had been taking all of his orders from Kurz. Kurz apparently had so much to do with the steamship "Eureka" that he was the only superior who was known to the master of the "Eureka." The other persons connected with the "Eureka" had so little to do with the vessel that there was considerable doubt that her master would recognize instructions received from them if they had signed communications addressed to him. Are these facts compatible with the theory that Kurz was an agent merely for soliciting freight? Third persons dealing with Kurz had the right to rely on his apparent authority. Kurz cannot at a later stage in the proceedings, say that his authority was limited to soliciting freight. When the Oregon-California Shipping Company, Inc., permitted Kurz to send all messages to the master of the "Eureka" and to direct her

movements, it is submitted that they clothed Kurz with apparent authority to look after the vessel.

The District Judge in the course of his opinion said:

> "While L. Rubelli's Sons may have ceased to legally represent the shippers at the time of this trouble yet, from the situation, it is clear that that firm might be a factor in the control of the good will of such shippers, as well as assist in finding another cargo in New Orleans for the 'Eureka.' "
>
> (Opinion pages 73 and 74.)

There is no evidence in the record whatever that L. Rubelli's Sons & Company were ever the agents of the shippers. Indeed there is no such suggestion made by any of the witnesses or in any of the documents which have been put in evidence.

It is shown from the telegrams which passed between the Oregon-California Shipping Company, Inc., and Rubelli's Sons that the Oregon-California Shipping Company were urging Rubelli's to do all that they could to relieve the situation brought about by the detention of the steamship "Eureka" at Colon. If Rubelli's had nothing to do with the management of the ship and were merely agents for soliciting freight, it is hardly likely that such telegrams would be addressed to them.

Moreover, so far as we can see it, as the bills of lading were signed by employees and agents of Rubelli's and the goods were received on board on the faith of such bills of lading, such a fact is more conclusive as to the relationship between Rubelli's Sons & Company and the Oregon-California Shipping Company, than any oral testimony of Kurz.

Kurz in his testimony was obviously attempting to keep on good terms with both parties to this controversy and it will appear from reading his testimony that he was obviously unwilling to testify to more than he was compelled to admit from written documents.

On this question of agency, there are a number of allegations made in the answer which are unlikely. In the answer it is alleged that the Oregon-California Shipping Company, Inc., issued a bill of lading to the libellant. This allegation is repeated from time to time. The answer, therefore, admits that the bills of lading were lawfully issued, as the bills of lading were signed by employees and agents of Rubelli's Sons & Company. The following allegation also appears in the answer:

> "That when it became apparent that the said canal would probably remain closed for some time the owners and charterers of the said steamship *'Eureka' and their agents*, endeavored to find some method of transshipping the cargo."
>
> (Answer, Apostles page 41.)

The same allegation is repeated in article eight of the answer on page 43 of the Apostles.

It appears from the evidence that the only persons who exercised themselves to transship this cargo were the Crossett Western Lumber Company, Williams and Kurz.

The court below was of opinion that unless the libellant was able to show that Rubelli's Sons & Company were the general agents of the steamship "Eureka," the demand made by Mitchell upon Kurz was not a sufficient demand for the return of his goods. It is

submitted that the court below erred in so holding. Kurz was directing the movements of the "Eureka" and whether or not he had the authority of general agency for all business of the Oregon-California Shipping Company, Inc., is immaterial. He was authorized by the Oregon-California Shipping Company to deal with the steamship "Eureka."

Our adversary suggested further that demand should have been made on the master of the "Eureka" at Colon. Would it not have been futile to make a demand on the master when the master would have referred the demand back to Kurz?

Point IV.

CLAIMANT HAS INTRODUCED NO PROOF TO SHOW THAT IT WAS IMPOSSIBLE TO DELIVER LIBELLANT'S GOODS WHEN THEY WERE DEMANDED.

Although libellant had prepaid the entire freight and was willing, in order to get its goods, to pay for the discharge of that part of the cargo which might have to be moved to get at libellant's goods and also pay for the reloading of such cargo, Kurz refused to deliver libellant's goods. Kurz admits that libellant made the proposition, but offers no excuse for his failure to comply with the demand. It has been suggested in the claimant's brief that the cargo could not have been discharged. Kurz has made no such claim. We believe that, if such were the fact claimant would have had no difficulty in establishing the fact. It has not, however, called a single witness for that purpose. The

suggestion that a quantity of other cargo would have to be disturbed in order to reach the libellant's goods, does not affect the case as libellant offered to pay the entire expense.

It has also been suggested that there was no place at Panama where the cargo could be landed. This is not proved, nor do we believe it to be the fact. Cargo intended for transshipment across the Isthmus could not be landed, but there is no proof that cargo could not be taken out of the ship temporarily to permit restowing. Moreover, the cargo would not have to be discharged. To take out libellant's goods it was only necessary to break out one hold. The cargo could have been easily placed on deck for the short time required to get at libellant's goods.

It has also been suggested by claimant's advocate that it would have done libellant no good to have its cargo. This is hardly a question for claimant to decide. Yet we have shown that it would have been of great benefit for Mr. Mitchell knew that he could take care of the cargo at Colon.

He says:

> "Q. Did you object to your goods going by way of the Straits of Magellan? A. I did.
>
> Q. Why did you do that, for what reason did you object to your goods going that way?
>
> A. Because we made demand for the goods at Colon knowing that we could get rid of them quicker and easier after taking delivery at Colon, and also the further fact that the long voyage around by way of Magellan would naturally tend to make the batteries what we call seconds instead of first class cells."
>
> (Mitchell, pp. 39-40.)

Mr. Mitchell further says:

> "A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama-Pacific Line, the Panama Steamship Company, the American Hawaiian Company and also the Luckenbach people, and *they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.*"
>
> (Mitchell, p. 185.)

As all of the companies mentioned by Mr. Mitchell were regularly operating steamers from Colon to New York and were general cargo carriers, there can be no question but that the National Carbon Company could have made arrangements with these various carriers to have brought their goods back to New York. The suggestion that because the claimant could make no arrangement for the transshipment of the entire cargo; therefore the libellant could not is a *non-sequitur*. It is quite a different thing for a large company, such as the National Carbon Company, to obtain room for three comparatively small shipments of goods totaling three hundred and forty-eight (348) barrels, than for a Steamship Company to make an arrangement for the transshipment of an entire cargo with a rival company. Naturally the rival carrier would desire to accommodate such a shipper as the National Carbon Company for the sake of future business; whereas its attitude toward the claimant would be to give no assistance to a rival in distress.

It is to be further noted that the libellant had similar goods on another steamer which was held up by the Panama slide. This steamer put back to New York and there delivered libellant's goods without damage.

Point V.

THE DELAY OF THE STEAMER AT COLON WAS UNWARRANTED.

It is well settled that a vessel with perishable cargo on board is responsible for damage caused by unwarranted delay:

The Queen, 28 Fed. Rep. 755;
The Coventina, 52 Fed. Rep. 156;
Schwarzschild v. National Steamship Co., 74 Fed. 257;
Propeller Niagara, 21 How. 7;
The Gutenfels, 170 Fed. Rep. 937.

In *The Coventina,* the court said:

> "So here, when it was found that this ship had been seized and could not be released, except at great risk to the owners, until the end of an uncertain litigation, *reasonable consideration of the shipper's interests required either that the goods should be transshipped to their destination by some other vessel, or else that the shipper should be notified of the liability to delay, and the privilege given him to reship at his option. In default of this the ship took on herself the risk of loss by delay,* with the right of recourse to the charterers for indemnity."

The Supreme Court, in *Propeller Niagara* (21 How. 7) said (p. 27):

> "Safe custody is as much the duty of the carrier as conveyance and delivery, and when he is unable to carry the goods forward to their place of destination from causes which he did not produce and over which he had no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel in King v. Sheperd, 3 Story (C. C.) 358, to maintain the proposition assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction this doctrine and held that his obligation, liabilities and duties as a common carrier still continued and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract as universally understood in the courts of justice."

See also, *The Maggie Hammond*, 9 Wall. 435.

As early as October 12th (Libellant's Exhibit "59"), the steamship company was informed by Rubelli's that the canal would not be open on November 1st, and that it was impossible to say when it would be opened. After that time telegram after telegram was sent it urging that something be done with the steamer and her cargo. No orders were given to the master of the "Eureka" to

proceed until November 4th (Libellant's Exhibit "54"). The only excuse for this delay is contained in Libellant's Exhibit "47," a telegram from Oregon-California Shipping Co., Inc., addressed to Rubelli. That telegram is as follows:

> "*Do not make arrangements to transfer Eureka cargo as owners will not permit us to place ship on Atlantic trade* stop. Our best legal talents pronounce slides act of God and state we are exempt from payment during detention what is your opinion see section three Act of Congress February thirteenth, eighteen ninety three."

As was said by the court, in the case of *The Coventina,* 52 Fed. Rep. 150 cited above, the owner of the cargo was not interested in the dispute between charterer and owner as to the trade in which the ship should be used. The ship was bound to the goods to fulfill her contract of affreightment. Knowing as they did the character of the cargo (and the Oregon-California Shipping Co., Inc., knew this as well as Kurz. See National Carbon Company's telegram of October 18th to Oregon-California Shipping Co., Inc., informing it of the perishable nature of the cargo) it was the duty of the Oregon-California Shipping Co., Inc., to either deliver the cargo *at once* to the National Carbon Company in accordance with its demand, or to bring the ship to some port where proper transshipment arrangement could be made. It certainly had no right to delay until November 4th before making a decision merely because the owners of the vessel would not permit her to be used in the Atlantic trade. It should have discharged the cargo at

once at Colon or it should have brought the steamer forthwith to some American port where the cargo could be discharged.

The court will observe from an examination of Libellant's Exhibits 45 and 46, that respondents knew as early as October 5th, that no arrangement could be made for the transshipment at Panama. Under these circumstances, what possible excuse can there be for waiting a full month at Panama, before making the decision to bring the vessel to New Orleans?

The claimant takes the position that the libellant is not entitled to recover damages because the delay in delivery after libellant's demand for delivery at Colon, was expressly exempted by the bill of lading.

The cases which we have cited above show conclusively that the bill of lading exemption does not refer to such a delay. The only delay which a carrier can legally exempt himself from is an unavoidable delay. The delay in delivery of the goods was not unavoidable, but was for the purpose to permit the owners and charterers to come to some decision as to the future use of the vessel. The telegrams passing between the California-Oregon Shipping Co., Inc., and Rubelli establish this fact. Should libellant suffer because of the delay in reaching a decision?

The claimant further says that the damage was not the natural and proximate cause of the refusal to deliver. The testimony of the libellant conclusively shows that it was. This testimony has not been rebutted.

It is obvious that the cargo at Colon was damaged by heat. Libellant's witnesses have testified that the longer

the vessel remained at Colon the worse the heat in the holds became. Obviously toward the end of the time the vessel was lying at Panama the deterioration from heat became a real danger. If the vessel had left Colon when it was known that the cargo could not be transshipped, libellant's witnesses testify that there would have been no damage.

The case of the *St. Quentin*, cited by our opponents in the court below, refers to an entirely different state of facts. That was not a case of refusal to deliver cargo on demand. It was a case of damage to cargo caused by heat while the ship was proceeding on her voyage through the Red Sea. In the present case the vessel was at rest (see Coxon's testimony as to the increase of heat in a ship's hold while she is at rest). There was no unwarranted delay in the *St. Quentin* case. An unwarranted delay constitutes a deviation (*The Indrapura,* 171 Fed. 929, 932). In cases of deviation a carrier is not entitled to the benefit of bill of lading provisions (*Globe Nav. Co. v. Russ Lumber & Mill Co.,* 167 Fed. 228).

It is respectfully submitted that the decree of the District Court should be reversed with costs.

Respectfully submitted,

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